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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether it is a denial of due process or equal protection under the U.S. Constitution where a state appellate court by two different panels of the same court on the same set of facts renders inconsistent decisions that are opposite in effect thereby denying a jury trial and other relief under 42 U.S.C. 1983.

II. Whether a landowner is denied equal protection or due process under the U.S. Constitution where the issues of law determined by the state court do not apply equally to all similarly situated litigants.

III. Whether the state court correctly applied the law of *res judicata*.

IV. Whether a landowner must be deprived of all beneficial use of his property for there to be a taking of property under the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

The petitioners are Maenette B. Smith and Jess Joseph Smith, husband and wife, as tenant-by-entirety owners of the subject property.

The respondents are the Maryland-National Capital Park and Planning Commission and Prince George's County, Maryland.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maenette B. Smith, et vir, respectfully petition for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland ("1st CSA"), filed April 28, 1992, App. 1a, and is unreported. The opinion of the trial court, Judge Johnson, of the Circuit Court for Prince George's County, Maryland, filed April 10, 1996, App. 15a. The opinion of the Court of Special Appeals of Maryland ("2nd CSA"), filed April 14, 1997, App. 24a, and is unreported.

JURISDICTION

The unreported opinion of the Court of Special Appeals of Maryland was filed on April 14, 1997. Petition for Writ of Certiorari to the Court of Appeals of Maryland was denied on August 22, 1997. Petition for Extraordinary Relief to the Court of Special Appeals of Maryland was denied on November 10, 1997. In Application No. A-282, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari until December 22, 1997. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V, XIV, § 1
42 U.S.C. § 1983
MD. CONST., art. IV, § 18 (Michie 1997 Repl. Vol.)
MD. DECL. OF RIGHTS, art. 23, 24 (Michie 1997 Repl. Vol.)
MD. ANN. CODE, art. 28, §§ 1-101, 7-111, 8-101, 8-104, 8-106, 8-119 (Michie 1997 Repl. Vol)
MD. RULES §§ 8-113(a), 8-114(a),(b), 8-606(e)

STATEMENT OF THE CASE

This case[1] relates to a claim under 42 U.S.C. 1983 in a state court with jury demand where it is alleged by the petitioners that a building permit was wrongfully denied based on a zoning map that had been changed without notice or hearing[2] contrary to the requirements of a state statute, and to constitutional due process and equal protection. The instant case was originally dismissed by the first trial court for failure to exhaust administrative remedies since there was a co-pending administrative appeal relating to the denial of the building permit for the subject property. On appeal[3] the Court of Special Appeals of Maryland, in an unreported opinion, App. 1a, ("1st CSA"), held that the 42 U.S.C. 1983 claim was well pled, remanded the case to the trial court for a factual determination as to whether the zoning map of the subject property had been changed inasmuch as material facts were in dispute, and the case was then stayed pending the determination of the then co-pending administrative appeal case and the court issued its Mandate, App. 13a. Subsequently, the administrative appeal was determined favorably to the petitioners[4]. The building permit for the subject property was issued after an areawide Sectional Map Amendment changed the zoning map of the subject property.

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[1] There have been other cases relating to the development of the subject property and a Brief Summary of each case is at App. 106a.

[2] For emphasis added and pertinent text portions of the MD. ANN. CODE, art. 28, §§ 8-101, 8-104, and 8-106 (Michie 1997 Repl. Vol), see App. 49a-50a.

[3] Although the right to appeal is not an issue, the statutory right of appeal in Maryland is found in MD. ANN. CODE, CTS. & JUD. PROC., § 12-301 (Michie 1997 Repl. Vol).

[4] All of the files of the administrative appeal case including all of the transcripts (all testimony was under oath) and exhibits are filed in the instant case under affidavit of the Clerk of the Board of Appeals on Nov. 16, 1990, since the same evidence in that case and the subdivision case is controlling here.

The administrative appeal case was then dismissed by the trial court on March 14, 1995, all parties having withdrawn their appeal, and thus the administrative appeal case and the appealed Order of the Board of Appeals, App. 128a, became final on March 14, 1995. On remand after the building permit had been issued and the administrative appeal case dismissed by the court, the second trial court in the instant case, Judge Johnson, denied the petitioners' Motion for Partial Summary Judgment[5], granted the Maryland-National Capital Park and Planning Commission's ("M-NCPPC"[6]) Cross-Motion for Summary Judgment, and dismissed Prince George's County as a party, App. 15a. The Court of Special Appeals of Maryland, in an unreported opinion, App. 24a, ("2nd CSA"), affirmed the trial court. Petitioners filed a Petition for Writ of Certiorari in the Maryland Court of Appeals, App. 31a, that was denied on August 22, 1997, App. 62a. Petitioners filed a Petition for Extraordinary Relief with the Court of Special Appeals, App. 63a, inasmuch as the two CSA opinions were inconsistent and that Petition was denied without comment on November 10, 1997, App. 92a.

When the petitioners purchased their approximately one (1) acre of property in Upper Marlboro, Prince George's County, Maryland, in 1977, it was zoned approximately one-half in the residential zone (R-80) where the petitioner's home is located, and approximately one-half in the commercial (CSC) zone where the subject property is located.

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[5] The Motion for Partial Summary Judgment was only on the issue of liability and not on damages. In their Motion, the petitioners argued *res judicata* as to the subdivision case and the administrative appeal case, direct and collateral estoppel, detrimental reliance on the proper governmental official, and a taking of property.

[6] Although the term M-NCPPC is used throughout, M-NCPPC and Prince George's County, at all times material hereto were and are in privity with M-NCPPC making the recommendations and Prince George's County making the final determination. The term 'M-NCPPC' is used throughout to mean both M-NCCPC and Prince George's County.

Since the only approved zoning map of the subject property, dated 7/12/77, was not clear with respect to zoning lines relative to property lines, the petitioners took the zoning map of the subject property[7] to the proper governmental official at M–NCPPC who advised the petitioners how the lot should be subdivided to make it into two lots, one lot zoned all residential and one lot zoned all commercial. This advice was followed by the petitioners so that the newly created subdivision, Lot One, Marlborough House, the subject property, would be all in the CSC zone. The division of the property was selected so that the zoning line and the property line between the newly created subdivisions would be co-located along the existing zoning line thereby forming two adjacent lots with single zone zoning for each lot.

The subdivision of property in Prince George's County is controlled solely by M–NCPPC. The petitioners filed for a subdivision of their property with M–NCPPC who then denied the subdivision. Upon appeal, the M–NCPPC denial was reversed and the subdivision of the subject property was granted by the court.

In reliance upon the representation of the proper governmental official, the petitioners expended in excess of $100,000.00 in the subdivision and development of the subject property for architect, engineering, surveying, soil borings, financing, bonds, and other miscellaneous expenses, to get to the position of obtaining a building permit by complying with all of the requirements of Prince George's County for such building permit[8].

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[7] App. 140a. This is the pertinent portion of the zoning map that was taken by your petitioners to the proper official at M-NCPPC for guidance since it showed property lines that were not in existence (marked by 'x') and the absence of an alley (marked by wavy lines) adjoining the petitioners' property and forming the eastern boundary of the subject property.

[8] The affidavit of Mr. James Carr, Chief, Permit Section, Construction Standards Division, Department of Environmental Resources, Prince George's County, Maryland, dated Nov. 16, 1990, stated that the

A zoning map in Prince George's County is composed of a 'base map' that contains street locations, property boundaries, etc., and a transparent 'zoning overlay' that contains only zoning boundaries. When the zoning overlay is placed over the base map and copied, a zoning map is thereby formed. M–NCPPC maintains the base maps and the zoning overlays. The District Council maintains custody of all of the originals of the adopted and approved zoning maps. At all times material to the building permit application, the only adopted and approved zoning map of the subject property was that map known as the '77 zoning map, App. 140a, the map originally taken to the proper governmental official at M–NCPPC for assistance[9].

The only governmental entity in Prince George's County that is empowered to adopt, approve, and make any changes to a zoning map is exclusively the District Council (the elected County Council for Prince George's County, Maryland, sitting as the District Council [the same members of the County Council are called the "District Council" when they are conducting zoning business, that is, they just switch hats]) and then only after notice and hearing pursuant to Art. 28, §§ 8-101, 8-104, and 8-106, the emphasis added and pertinent text portions of which are outlined at App. 49a-50a.

On August 22, 1988, M–NCPPC changed the zoning map of the subject property without notice or hearing. On March 16, 1990, M–NCPPC, without notice or hearing, again changed the zoning map of the subject property. As a result, both zoning map changes made part of the subject property into the CSC and R-80 zones, that is, the subject property was then 'dual zoned'. Neither of these zoning maps had ever been adopted or approved by the District Council as required by statute. These two unapproved zoning maps of the subject property were nevertheless the only zoning maps

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petitioners had complied with all of the lawful requirements of a building permit except for the approval of M–NCPPC.

[9] The proper governmental official, although present at the hearing before the Board of Appeals, did not testify or contradict the testimony of the petitioners.

used by M–NCPPC to recommend denial of the building permit application for the subject property.

It is significant to note that the petitioners conceded below that, if their property had been dual zoned when they applied for a building permit, they should have done everything the trial court and the 2nd CSA suggested they should have done[10]. Likewise, the petitioners conceded below that M–NCPPC has the right and duty to maintain base maps[11].

One of the ways to change the zoning of a property is through a process called a Zoning Map Amendment where an individual application is filed at any time and considered separately by the District Council with recommendation of M–NCPPC. Another method of obtaining a change in the zoning of property is through a Sectional Map Amendment ("SMA") where a large part of the County is periodically considered for updating the zoning maps for all of the properties inside the geographical area covered by the SMA.

After the passage of time and in 1994 the subject property was considered for a SMA. Having been unsuccessful at getting a building permit for the subject property and fearing that the subject property would be downzoned to residential, the petitioners, by letter, pointed

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[10] After written notification that the building permit was denied, the petitioners met on at least two occasions with the staff of M–NCPPC to try to work out any problems but they were unsuccessful. Part of the problem was the history of M–NCPPC not wanting the project, M–NCPPC appearing in opposition where they normally did not appear in opposition, M–NCPPC improper denial of the subdivision of the subject property, changing the zoning map of the subject property without notice or hearing, and the likelihood of denial of any other proceedings before M-NCPPC relating to the proposed development that M–NCPPC did not want.

[11] But when a changed base map is copied with a zoning overly thereby creating a new zoning map, a notice and hearing is required because it changes the zoning of the property and the substantive property rights of the landowner.

out the error of the zoning designation on M–NCPPC 'zoning maps'[12] as placing the subject property in two zones.

The Clerk of the District Council testified that at the time of the building permit application and at the time of the hearing before the Board of Appeals that the only adopted and approved zoning map in existence was the 1977 zoning map.

The instant lawsuit, beginning as a declaratory judgment action, was timely filed after the petitioners had been informed orally by M–NCPPC that they would recommend denial of the building permit application based on the changed zoning map of August 22, 1988[13].

M–NCPPC has not expressly stated in any of the proceedings relating to this case that they changed the zoning map of the subject property[14]; however, they do state as their

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[12] There is no such thing as M–NCPPC 'zoning maps' and the reference was to the two zoning maps that M–NCPPC had changed without notice or hearing. M–NCPPC maintains that this is an application for rezoning and your petitioners maintain that it is a notification of an error in M–NCPPC 'zoning map' and, thus, this is the only disputed material fact in the whole case. Your petitioners submit that the subsequent rezoning issue of the subject property by SMA relates, in any event, to damages only, if any, and not to liability pursuant to 42 U.S.C. 1983.

[13] Prior to filing the instant case and on December 4, 1989, (respondent M–NCPPC exhibit #5 filed in these proceedings) the petitioners wrote the Chairman, M–NCPPC, and pointed out the error in M–NCPPC changed zoning map and asked that it be corrected because of their pending building permit application. There were several meetings with the staff of M–NCPPC before filing the instant case to try to resolve the issues, all without success (respondent M-NCPPC exhibit #6, dated Dec. 15, 1989, filed in these proceedings).

[14] M–NCPPC witnesses testified before the Board of Appeals that M–NCPPC changed the base maps of the subject property (thereby changing the zoning maps of the subject property) and that the building permit application of the petitioners was recommended for denial based on the changed zoning maps of the subject property. The Clerk of the District Council testified before the Board of Appeals that the only adopted and approved zoning map of the subject property was the 1977

reasons for changing the zoning maps of the subject property that the petitioners' surveyor made a mistake, that the petitioners refused an offer for a new survey, that the petitioners failed to contact them after the notice of denial of the building permit application and that petitioners failed to ask for a special exception or a change of zoning for their then allegedly dual zoned lot.[15] M-NCPPC clearly does not have the power to change zoning maps[16], Md. Ann. Code, art. 28, §§ 8-101, 8-104, 8-106.

FEDERAL QUESTIONS: The federal questions relating to 42 U.S.C. 1983, due process, *res judicata*[17], estoppel, and taking were raised in the Second Amended Complaint[18], paper #59, para. #40, filed in these proceedings on Nov. 11, 1990, and printed below. All of these issues have been vigorously pressed before every court considering this case since that time. The questions relating to inconsistent opinions of the CSA were advanced before the court that issued them, the CSA, by way of a Petition for Extraordinary Relief, App. 63a, filed in the CSA on Oct. 15, 1997, and

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zoning map, the one used by the petitioners to subdivide their property originally.

[15] The petitioners met with M–NCPPC on several occasions to try to resolve any disputes, without success, both before and after the written notice that M–NCPPC would recommend denial of the building permit application. See also footnote 10.

[16] Counsel for M–NCPPC, in his final argument before the Board of Appeals stated: "Park and Planning doesn't make its own zoning maps. Clearly, we don't have the authority for that, and there is no argument on that." See also, MD. ANN. CODE, art. 28, §§ 7-111, 8-119.

[17] "Issue of the case", being part of the law of *res judicata*, was raised at the outset of this case but the specific terminology "claim or issue preclusion" was used for the first time in the Appellant's Brief filed before the 2nd CSA case, on Sept. 23, 1996. After the administrative appeal case was dismissed, *res judicata* with respect to the administrative appeal case was raised for the first time in the Motion for Partial Summary judgment filed on Dec. 1, 1995.

[18] The 1st CSA found that the 42 U.S.C. 1983 claim had been properly pled and mandated its adjudication.

Appellants' Reply to MNCPPC Opposition filed on Oct. 22, 1997, and the requested relief was denied, App. 92a.

The questions relating to issues being contrary to the remand from the 1st CSA and loss of jury trial were raised in the Brief of Appellants (petitioners here) before the 2nd CSA, filed on Sept. 23, 1996, wherein it was said: "Clearly this assumption by the trial court is contrary to the remand from the Court of Special Appeals in this case to determine whether, in fact, there had been a change in the zoning".

The federal questions of both due process and equal protection (U.S. Const. and MD Const.) relating to jurisdiction of the 2nd CSA was raised in the Petition for Extraordinaary Relief filed on Oct. 15, 1997.

The issue of inconsistent opinions was raised the first time available to the petitioners in the Petition for Writ of Certiorari to the Maryland Court of Appeals, App. 31a.

The issue relating to unpublished opinions was raised in the Petition for Writ of Certiorari to the Maryland Court of Appeals, App. 31a, and the Petition for Extraordinary Relief, App. 63a, filed before the CSA on Oct. 15, 1997, and in Appellants' Reply to MNCPPC Opposition filed on Oct. 22, 1997, para. 3 below. The requested relief was denied, App. 92a.

> "3. It is submitted that it is a denial of due process and equal protection provided by the U.S. Constitution where: (1) the Trial Court failed to adjudicate issues in regard to a federal claim under 42 U.S.C. 1983, particularly since this was the primary issue in 1st CSA, where the Court said that the issue had been well pled, and the case was remanded for that among other reasons, (2) the Trial Court failed to adjudicate the issues in regard to reliance on the proper governmental official and estoppel, (3) to issue an 'unpublished opinion' in a land use case while other land use cases are not so treated, and (4) that Maryland Rules 8-113 and 8-114 are unconstitutional as applied in this case."

Because the language of the 2nd CSA relevant to the issues raised is not clear, the peitioners are not certain specifically what the court passed on except that it stated that the petitioners were not entitled to damages, there was no taking, and the Prince George's County was properly dismissed[19]. Neither the trial court, Judge Johnson, or the 2nd CSA addressed the claim under 42 U.S.C. 1983. Although pressed at every level, the issues relating to *res judicata* of the subdivision case, estoppel, and detrimental reliance have never been addressed by any Maryland court.

> "40. That all of the aforesaid acts by the Defendants, MNCPPC, Prince George's County, and the District Council, were arbitrary, capricious, and unreasonable, unlawful and without any foundation in law, are barred by res judicata and collateral estoppel, and the Plaintiffs are entitled to rely on governmental employees whose job and duty it is to see that their development is properly subdivided and constructed, serve no substantial public purpose or legitimate governmental objective, are vindictive against your Plaintiff's who were successful against the MNCPPC in having their property subdivided contrary to the desires and wishes of the MNCPPC, apply the rules, regulations, ordinances, and laws relating to the development of the subject differently than other similar property, is ultra vires, is an improper exercise of the police power, is unduly harsh impact on the owners and Plaintiffs, failed to follow their own procedures in changing the zoning map of the subject property, unlawfully withholding a building permit, is a substantial interference with the Plaintiffs' property rights, a deprivation or taking of the Plaintiffs' property without due process contrary to the Federal and State constitutions, and that such actions are, further, in bad faith and without substantial justification, and are for the purpose of delay with the

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[19] Before Judge Johnson, the District Council had been previously dismissed by the Petitioners.

full knowledge that the laws effecting the development of the subject property will make the development impossible to construct or complete if the matter can be prolonged long enough."

REASONS FOR GRANTING THE PETITION

I. Inconsistent Opinions from Same Court, Jurisprudential Scandal

Actions relating to 42 U.S.C. 1983 may properly be brought in state courts, *Martinez v California*, 444 U.S. 277 (1980), *Maine v. Thiboutot*, 448 U.S. 1 (1980). And "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[20], *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). See also, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). And a jury trial is proper in a 42 U.S.C. 1983 case, *Burt v. Board of Trustees*, 521 F.2d 1201 (CA4 1975), *aff'd*, *Burt v. Abel*, 466 F.Supp. 1234 (1979).

Because the 1st CSA remanded this case for a determination of the factual issue of whether the zoning of the subject property had been changed, the trial court, Judge Johnson, and the 2nd CSA, it is submitted, were compelled to follow such order and mandate and had no jurisdiction to do otherwise, Maryland Rule 8-606(e), and as the Maryland Court of Appeals said in *Klopfer v. Werber*, 264 Md. 419, 421, 422, 286 A.2d 776 (1972), that: "When the mandate has been transmitted the lower court shall proceed according to the tenor and directions thereof... ...and could pass no valid decree or order in respect thereto, which was not in

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[20] It is sometimes difficult to separate arguments with respect to equal protection and due process, U.S. CONST., amend. XIV, § 1, and the arguments made in these first two issues both relate to amend. XIV, § 1 although it may not be expressly indicated separately in each argument.

conformity with the opinion and mandate of this Court. *Maloy v. McLean*, 140 Md. 306". Cf. *McNeil v. State*, 112 Md App. 434, 685 A.2d 839 (1996). See also *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), for the proposition that a state's appellate procedures must comply with the due process clause of the U.S. Constitution, Fourteenth Amendment, although a criminal case relating to the effectiveness of counsel.

"Obviously, if two decisions are inconsistent, one of them is wrong. Without more, however, the evil does not lie in the inconsistency; it lies in the erroneous decision."[21] One of the hallmarks of the judicial system is the doctrine of *stare decisis*, and it has been said[22]: "The nub of the matter is that *stare decisis* does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved .... [T]here is potential for jurisprudential scandal in a court which decides one way one day and another way the next ...". Of course, the effect of two inconsistent decisions is avoided by making the cases unreported as argued, *infra*, with respect to issue II, equal protection. Further, the dissenting opinion expressed in *Smith v. Allwright*, 321 U.S. 649, 669 (1944), concerning the courts' changing rationale for its decision might be said of the inconsistent opinions of the CSA in the instant case that it "...tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

Here, the 1st CSA determined that the issue of the zoning of the property is an issue of material fact and remanded the case to the trial court, App. 11a-12a. On remand, the trial court then **assumed** that the property had, as a matter of fact, been rezoned notwithstanding the dictates of the 1st CSA that the issue of rezoning the subject property was a disputed question of material fact. As the trial court

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[21] McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488 (1991).

[22] Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 145, n. 110 (1977).

stated, App. 16a, 5th line: "Lot 1-Marlborough House, on the other hand, was dual-zoned at the time this action was instituted and is the subject of the proceedings before the Court." Further, the trial court, App. 19a, 2nd full para., 5th line, said: "Contrary to the Smiths' representations regarding the effect of the M–NCPPC updating base maps, the Court finds that the agency did not cause Lot 1-Marlborough House to be dual-zoned." Likewise, the trial court made a finding of fact that the Smith's property was dual-zoned when it said at App. 21a, 1st sentence, "The Smiths' property was dual-zoned and did not conform with certain of the County's plans and policies." -- All notwithstanding the 1st CSA that stated that the question of rezoning was a disputed question of fact. The 2nd CSA opinion, likewise, **assumes** or finds that the subject property was not rezoned, that is, it was in dual zones as a matter of fact. As the 2nd CSA said at App. 26a, 1st sentence, "Upon reviewing the Smiths' application, M–NCPPC realized that a portion of the Property was zoned R-80 and a portion was zoned C-S-C" (in accord is footnote 3 at App. 26a). Likewise at App. 30a, 1st sentence, "Before being updated by M–NCPPC, the Property was zoned both R-80 and C-S-C."

The trial court and the 2nd CSA criticize the petitioners for, *inter alia*, not complying with the request of the M–NCPPC to obtain a special exception, a rezoning, a survey[23], etc. The motivation for the trial court[24] and the 2nd

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[23] The northern boundary of the petitioners' property (that boundary found by the Board of Appeals that M-NCPPC had changed [App. 133a-134a, findings 9, 11, 14]) had been fixed by Deed of Agreement recorded among the Land Records of the County in 1968 as shown by the exhibits in this case as well as from the records of M–NCPPC. The east boundary of the subject property was formed by the alley, the south boundary by Church Street, and the western boundary was owned by the petitioners. Other reasons for not needing a surveyor are that a duly registered surveyor had been employed who explicitly followed the directions of the proper representative of the M–NCPPC, there was a court approved subdivision plat established boundary lines, the subdivision plat approved by Chairman, M–NCPPC, the subdivision plat

CSA by use of the terms like 'misrepresentations'[25] and disingenuous[26] is not clear. As the petitioners have previously conceded[27], had the property been dual zoned, in fact, when the building permit had been applied for, the petitioners should have done everything the trial court and 2nd CSA suggested that they did not do[28].

Fundamental fairness, it is submitted, depends on the facts of the particular case, *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981), see also, *Richards v. Jefferson*

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that was approved by Chairman, M–NCPPC, was recorded among Land Records of County, and the Board of Appeals, by the time this argument was made in court, had decided the case in favor of the petitioners.

[24] The issue of the trial court's appearance of impropriety was raised in the petitioners Petition for Extraordinary Relief, App. at 68a, denied by the Court of Special Appeals on Nov. 10, 1997. This, of course, would not be an issue if the trial judge's son had been working for one of the parties for an extended time prior to the litigation or if counsel had known of it prior to the judge's consideration of this case. Petitioners were informed on or about the date of Judge Johnson's order that Judge Johnson's son had a job application in with M–NCPPC and Judge Johnson's son was, in fact, employed by M–NCPPC while the case was still pending before Judge Johnson.

[25] No representations are specifically referred to because there are none.

[26] At all levels of this land use litigation the parties have attempted to settle the matter but the factual context does not permit such an easy solution. It is respectfully noted that most of the time consumed in this litigation relates to the administrative appeal that was resolved adversely to M–NCPPC and the appeal was taken by M–NCPPC when it had no right to appeal and, as such, was frivolous.

[27] The petitioners also have previously conceded that M-NCPPC has the authority to change the base maps and probably should to keep the fire department, road names, house numbers, etc., correctly identified; however, when a change in a base map changes the zoning map, then there must be notice and a hearing.

[28] It is respectfully pointed out that the trial judge in the subdivision case found the petitioners, "Mr. Smith and his wife showed total flexibility to all of the reasonable suggestions of compromise and conditions for the approval of these subdivisions and the allegation that they were arbitrary or adamant about not doing so, is simply not true. The facts don't support it.", App. 120a, 2nd full para.

Co., 116 S.Ct. 1761 (1996). It is submitted that this case is a clear example of the denial of the fundamental fairness that characterizes a denial of due process. Further, under the "rational basis" test, *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 84 (1988), the petitioners have been clearly denied due process and equal protection.

It is submitted that it would be unfair to a litigant for the court to ignore the court's own rules and the prior rulings with respect to jurisdiction of the court and fundamental fairness requires that courts determine the cases before them fairly based on the law that is pertinent to the facts of the particular case, as this Court said in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." This principle applies likewise to changing zoning maps without notice or hearing. And it is reversible error not to follow established procedures, *Montilla v. INS*, 926 F.2d 162 (2nd Cir 1991).

Failure to decide or even comment on dispositive issues, e.g., *res judicata* as to the subdivision case, collateral estoppel, and detrimental reliance on the proper governmental official, is, it is submitted, effectively a denial of meaningful access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977), although a criminal case.

The decision of the 2nd CSA effectively denied a jury trial thereby denying your petitioners due process, Maryland Constitution, Declaration of Rights Article 23 and 24. Further, the failure to give notice and a hearing when the zoning map of the subject property was changed is, likewise, a violation of your petitioners' due process, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)[29].

Further the 2nd CSA did not find any material facts in dispute, and stated that "We agree with the Smiths and

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[29] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

M-NCPPC that there are no material facts in dispute.", App. 28a, 3rd line. Such a finding of fact by the 2nd CSA seems inconsistent even with its own decision in the case. It is presumed that this language means that the fact that M–NCPPC changed the zoning map of the subject property without notice or hearing (since that fact is undisputed by any party) and that M–NCPPC then relied on the changed zoning map to recommend denial of the building permit application of the petitioners (another fact that is undisputed by any party), does not entitle the petitioners to a partial summary judgment on the issue of liability. This reasoning and such position of the 2nd CSA seems to be inconsistent with the holding of the court (and that of the 1st CSA).

The 2nd CSA states, App. 28a, 4th line from top, that "What is in dispute, however, is whether the Smiths' are entitled to damages." It is respectfully pointed out to the Court, that the petitioners were not seeking damages in their Motion for Partial Summary Judgment[30]. This position of the 2nd CSA seems to be inconsistent with its holding since the issue of damages was not an issue in the Motion for Partial Summary Judgment solely on the issue of liability.

II. Unreported Opinions – Kiss of Judicial Death

The reported versus unreported judicial opinion[31] and the non-precedent status of judicial opinions is a cancerous and festering growth on the entire judicial system that merits

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[30] As the petitioners stated in their prayer for relief they were only seeking a partial judgment on the issue of liability: "WHEREFORE, your Plaintiffs pray: 1. That this motion for Partial Summary Judgment of the issue of liability be granted. 2. And for such other and further relief as the Court may deem just and proper." Nowhere in the pleadings on this motion did the petitioners ask for damages.

[31] For simplicity, the term 'unreported opinion' is used to represent unreported and unpublished opinions, decisions, judgments or rules of law by courts and includes the non-citation rule like that found in Maryland Rule 8-114, App. 162a—163a.

plenary attention and direction by this Court[32]. This issue relates to unreported opinions that, by rule of court, do not apply to other litigants[33]. The breadth of the problem is perhaps best shown by the voluminous scrutiny and criticism in the legal literature as measured against the opinion of the state appellate court in this case. Although it is apparently a significant problem in the federal system, the fact that the state courts handle approximately twenty-five times the number of civil cases as the federal system[34] gives rise to the reasonable conclusion that the problem of unreported opinions in the state courts is substantially greater than it is in the federal system. The instant case is illustrative of just such a problem. This is particularly true where the state courts

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[32] One of the guiding principles for determining publication of opinions is outlined in the Standards for Publication of Judicial Opinions, Federal Judicial Center, Research Series No. 73-2, App. 165a, where it states that: "The Standards For Publication Should Be Promulgated By Rule Of The Highest Court To Govern Its Publication Practice And That Of Courts Under Its Supervision." and, at App. 166a, with respect to publishing judicial opinions where one or more of the listed standards are met. One of those standards is: "The Opinion Lays Down A New Rule Of Law, Or Alters Or Modifies An Existing Rule." Also, those who have considered the reported/unreported opinion problem seem to uniformly agree that judicial opinions relating to new rules of law or opinions altering or modifying an existing rule of law should be published. Maryland, however, has no such standards. See also, A.B.A. Proposed Rule 3.37, App. 168a.

[33] Maryland Rule 8-114 provides, *inter alia*, that the unreported opinion is neither precedent within the rule of *stare decisis* nor persuasive authority. Aside from Maryland Rules 8-113 and 8-114, there are no other rules, policies, procedures or guidelines relating to unreported opinions (see letter from the Clerk of the Court of Appeals of Maryland, App. 105a, the only body charged with rule-making power pursuant to MD. CONST., art. IV, § 18, App. 144a.

[34] DIRECTORY OF STATE COURT CLERKS & COUNTY COURTHOUSES, Want Publishing Co., (1998 ed.), Trends in State Court Litigation, p. 357.

each have varying and different rules[35] from the federal courts, some without any standards as the Maryland Rule[36] relating to unreported decisions. The instant case appears to be the first time where the issue of unreported opinions has been clearly addressed to this Court, in this state court context. It is submitted that the Maryland Rule relating to what opinions are to be reported is plainly discriminatory on its face, so facially vague as to have no meaning, and, it is clearly unconstitutional as applied.

The unreported opinion is the kiss of judicial death to any petitioner or litigant seeking review. It is, sadly, when not properly used, also the kiss of death to *stare decisis* and the legal system as it is taught in law schools and as practitioners know it. As this Court has said in *Payne v. Tennessee*, 501 U.S. 824, 827, 828 (1991), with respect to overruling cases, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. ... ...Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved..."

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[35] A summary of the rules of each of the state courts is found in: Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21 (1991).

[36] Maryland Rule 8-113 provides that "The Court of Special Appeals shall designate for publication only those opinions that have substantial general interest as precedent." This could mean that the decision on whether to publish a case is determined by whether it sets down a new rule of law; or is frivolous in nature and should not be published; or that the case sets down no new rule of law or does not alter or modify an existing rule of law; or that the case is so poorly written or considered that it does not merit publication; or that the case is inconsistent with an existing opinion on the same facts, reported or unreported and should not, therefore, be published; or that the case relates to state security and should not be published; or that the case relates to juvenile matters that should be protected; etc.; etc.; etc; or that a lawyer litigant may only guess.

Numerous authors, law professors, judges, and attorneys, have commented on the need for rules and guidance for the use of the unreported opinion and how the likelihood for judicial review is diminished because of the judicial opinions' unreported nature and, thus, their applicability only to the litigants in that particular case[37].

In the resolution of this single issue only in the instant case[38], it is submitted that it makes no difference whether or not the decision below was favorable or unfavorable to the petitioners because it is the nature of the opinion, i.e., unreported and applicable to only these litigants, that makes it relevant to the issue of equal protection as argued here. The issue before the state court was clearly a case of first impression in the courts of Maryland. Since the inception of the Regional District Act[39] in 1927, a case of this nature relating to the M–NCPPC changing the zoning map of a property without notice or hearing[40] has never been decided although the facts of the case relate directly to the subject matter of the Regional District Act.

In the review of the classification of cases to be published as found in Maryland Rules 8-113 and 8-114, it is submitted that the classification must rest on some ground of difference having a fair and substantial relation to the object of the rule, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S.

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[37] At App. 113a is a list of some of the literature that has been reviewed in preparation of this petition. It is respectfully pointed out that this list is only a very small part of the voluminous amount of writings on the subject.

[38] Counsel is not abandoning the other arguments raised in this Petition.

[39] Art. 28, § 1-101, *et seq.*, (Only § 1-101 at App. 146a), of the Annotated Code of Maryland.

[40] It is, however, clearly the law of Maryland that the M–NCPPC does not exercise zoning authority, MD. ANN. CODE, Art. 28, §§ 8-101, 8-104, 8-106, App. 150a—161a. See also, *West Montgomery County Citizens Assoc. v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183, 522 A.2d 1328 (1987) and *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir*, 333 Md. 3, 633 A.2d 855 (1993).

522 (1959). Cf. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) and *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). In the instant case, it is submitted that the language of the noted rules has no fair and substantial relation to the object of the rule and thus seems to be directed to arbitrarily limiting the number of cases published or reported[41] and that such arbitrary objective of limiting of the number of cases to be published, without more, is not a constitutionally permissible objective. Cf. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

Without reason and without any standard of classification, some landowner litigants in Maryland have their judicial opinions published and some do not and no one is ever aware of any guidelines or standards by which a litigant can guide his actions. Current reported cases from the Maryland Court of Special Appeals clearly show that, with respect to land use litigants with permit problems, there is no particular method or manner of selection or classification of which cases are reported and which are unreported, e.g.: *Esslinger v. Baltimore City*, 95 Md.App. 607, 622 A..2d 774 (1993), *UPS v. People's Counsel for Baltimore County*, 93 Md .App. 59, 611 A.2d 993 (1992), *Sterling Homes Corporation v. Anne Arundel County*, 116 Md. App. 206, 695 A.2d 1238, (1997), *Offen v. County Council*, 96 Md. App. 526, 625 A.2d 424 (1993), *Sykesville v. West Shore Communications, Inc.*, 110 Md. App. 300, 677 A.2d 102, 1996, *County Commissioners of Carroll County*,

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[41] The Minutes of the Meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, dated October 11/12, 1985, p. 35, contain the following statement with respect to the adoption of the language (...shall designate for publication only those opinions that have a substantial general interest as precedent.) like that presently found in Maryland Rule 8-113(a), as stated: "Mr. Herrmann noted that current Rule 1092 b [apparently the Rule from which the current Rule was derived] is written in the negative because when this Rule was adopted the Court of Appeals was directing the newly created Court of Special Appeals to keep down the number of opinions published by the latter Court."

Maryland v. The Arundel Corporation, 82 Md. App. 418, 571 A.2d 1270, (1990). The case of *Esslinger, supra*, is particularly significant because that case had all of the issues involved in the instant litigation, namely, 42 U.S.C. 1983, *res judicata*, privity of parties litigant, collateral estoppel, and exhaustion of administrative remedies. Except, however, the instant case is one of first impression[42] where the local zoning body changed the zoning map of the subject property without notice or hearing and then relied on the changed zoning map to deny a building permit, thus a case of first impression before the Maryland Courts. It is submitted that the classification scheme for the publication of opinions by the Maryland Court of Special Appeals[43] is, basically, an imprecise generalization; that as written and as applied, the classification of litigants who have their cases unreported and not cited are basically cut out of the legal process since the determination of the court applies only to them and not to other similarly situated litigants.

It is a laudable purpose to reduce the workload of Courts[44] by reducing the number of reported opinions, "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they

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[42] Probably because M–NCPPC was not previously motivated or brazen enough except by the instant case where the petitioners were unpopular by having prevailed against M–NCPPC in the administrative appeal case and gone through the entirety of the files and records of the M–NCPPC (with their permission) to find that there was not a single paper, plat, diagram or document of any nature or description in existence at that time that showed the subject property in any zone other than all in the CSC zone.

[43] Found in Maryland Rules 8-113 and 8-114, App. 162a—163a.

[44] In the Court of Special Appeals of Maryland where there is an appeal of right, for the years 1991-1996 there has been an average number of 222.2 reported opinions per year and 1,394.4 unreported opinions per year, for an average number of 13.7% per year of the appeals to the Court of Special Appeals that have reported opinions. These figures are taken from the Annual Report of the Maryland Judiciary for the years listed.

were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.", *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), Cf. *Reed v. Reed*, 404 U.S. 71, 76 (1971) relating to the objective of reducing the workload of the probate courts. Of course, efficiency must never be the primary objective of a free people[45].

It is submitted that this Court should not go beyond the classification specifically stated or outlined in the rule thereby leaving no other purpose than its stated purpose for its existence, see *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) and that imprecision and generalization without precise legal standards articulated and applied will reduce a supposedly objective standard to the subjective unfettered discretion of the appellate panel. See also, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1992) and *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990). Of course, the use of such language does give the state appellate court unlimited latitude in deciding which cases to publish unfettered by any standards.

Under the Court's most deferential standard, the "rational basis" test, it is submitted that it is a denial of equal protection to publish arbitrarily, without rule or reason, some and not other cases relating to landowner litigants. (Particularly where the material facts of their case relate to the first time that a particular section of the law relating to as important a property right, or bundle of property rights, as the zoning of a landowner's property and the right to a building permit is considered by a state appellate court for the first time.) It is submitted that the equal protection clause does not forbid classification, it simply keeps governmental

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[45] Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. REV. 432, 435 (1976), n. 15, Remarks of Chief Justice Warren E. Burger at the ceremonies dedicating the new Law Center, Georgetown University, Sept. 17, 1991.

decision makers from treating differently persons who are in all relevant respects alike and that the protections of the equal protection clause are no less whether the classification is by legislative, judicial, or administrative action, *Nordlinger v. Hahn*, 505 U.S. 1 (1992). See also, *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1973). It would seem, however, that the right of review of appellate rules of state courts is as much a fundamental right as the right to vote, the right to have access to the courts, and the right to migrate interstate. In effect, as a result of the appellate rules of the Maryland Courts, citizens are unduly denied access to the courts via the unreported opinion route. While it is a legitimate state interest to see that all property is 'properly' zoned before granting a building permit, it is submitted that where the zoning authority has unlawfully changed the zoning of a property , it is not a legitimate state interest to require a rezoning of a citizens property before granting such a permit. Cf. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

It is submitted that it is a fundamental right of every landowner litigant to have his dispute with the government concerning his zoning, land use, and building permit denial considered fairly by the courts and that he be treated equally as to all other similarly situated landowner litigants. The 2nd CSA unreported opinion effectively bars access to appellate review just as much as an indigent is denied access to the court system where he can't pay the appeal fee. Appellate rules relate to the fabric and core of the judicial system and review of the rules by which every American must ultimately be bound, as in the instant case for example, where the whole 'panoply' or bundle of basic property rights are before the Court.

It is submitted that the language in the case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) is equally applicable to the instant case where this Court stated at 454:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the

> principles of law which officials would impose upon a minority must be imposed generally. Consequently, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply the legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

III. *Res Judicata*, Estoppel, Detrimental Reliance & Issue of the case

With respect to *res judicata* and collateral estoppel, the law of Maryland is the same as this Court. That is, the parties and those in privity with them are precluded from repetitive litigation on the same issues or issues that could have been raised in the previous litigation, *Warner v. German*, 100 Md.App. 512, 642 A.2d 239 (1994); *Chatman Corporation v. Beltram*, 243 Md. 138, 220 A.2d 589 (1966); *Singer v. Steven Kokes, Inc.*, 39 Md.App. 180, 384 A.2d 463 (1978); *Howard County v. Eberhart*, 58 Md.App. 407, 473 A.2d 509 (1984); *American Surety Co., v. Baldwin*, 287 U.S. 156 (1932); *Arizona v. California*, 460 U.S. 605 (1983); *Montana v. United States*, 440 U.S. 147 (1979); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351 (1877); *Grubb v. Public Utilities Comm.*, 281 U.S. 470 (1930), and the case of *Allen v. McCurry*, 449 U.S. 90 (1980) standing for the proposition that *res judicata* and collateral estoppel are available in a 42 U.S.C. 1983 action. Further, the principles of *res judicata* apply to questions of jurisdiction as well as to other issues, *American Surety Co., v. Baldwin*, 287 U.S. 156 (1932).

Of course, the doctrine of *res judicata* and estoppel are designed to prevent repetitive litigation so that it does not

burden scarce judicial resources. Such repetitive litigation is a problem of increasing concern[46].

It is submitted that 'law of the case' is to be distinguished from *res judicata* and estoppel as this Court said that where litigation proceeds along to judgment *res judicata* and estoppel will attach, *Arizona v. California*, 460 U.S. 605 (1983). Further with respect to the doctrines themselves, this Court has stated at 619:

> "Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877). 'To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.' *Montana v. United States*, *supra*, 440 U.S. at 153-154, 99 S.Ct., at 973-974.
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> In no contest is this more true than with respect to rights in real property."

Further, the strict rules of *res judicata* "...do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment.", *Richards v. Jefferson Co.*, 116 S.Ct. 1761, 1766 (1996). In the instant case, both Prince George's County and the M–NCPPC are in privity as to all issues decided in both the subdivision case and the administrative appeal case.

It is submitted to the Court that the uncontradicted evidence before the trial court (Judge Johnson), and likewise

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[46] McCoid, II, *supra* note 21 at 12.

before the 2nd CSA, is: (1) that the head of the subdivision office of M–NCPPC and other M–NCPPC employees testified (in the administrative appeal case) that the zoning category of a property is an issue in the subdivision of land; (2) that the preliminary subdivision plat submitted with the preliminary subdivision application has the zoning category of the property listed on it; (3) that the preliminary subdivision application requires the zoning category of the property being subdivided to be listed on it; (4) that the fee for subdivision of land is determined by the zoning category of the property; (5) that the zoning category of the property determines how the subdivision is processed (6) that if there is an error of the zoning category on the subdivision application, someone from M-NCPPC would note it, (7) that M-NCPPC has an employee who does nothing but check and correct any mis-information provided by subdivision applicants; (8) the trial court in the subdivision case referred to the property as being in the commercial zone, App. 119a, last line through 120a, line 2; (9) that the minutes of M–NCPPC relating to the denial of the subdivision application showed that the subject property was in the CSC zone; (10) that the preliminary subdivision plat, App. 126a-127a, approved by court order after denial of the subdivision by M-NCPPC listed "Existing Zone: CSC", item no. 3, App. 127a; (11) that at the time of the approval of the preliminary subdivision plat by the trial court there was not a single piece of paper, plat, plan or other document in existence anywhere including in any file of M-NCPPC that showed the subject property in any zone other than all in the CSC zone; (12) that the Chairman of M–NCPPC approved the subdivision plat of the subject property after court order; (13) that in its brief in the subdivision case, counsel for MNCPPC stated in his Memorandum of Law: "That petitioners herein are the owners of a .5522 acre parcel of land known as Marlboro House and zoned in the C-S-C category ...", such being the entirety of the subject property; (14) and that the subdivision plat of the subject property was recorded (under signature of the Chairman of M–NCPPC) among the land records of Prince George's County. It is

accordingly submitted then that the issue of the zoning of the subject property was appropriately before the trial court in the subdivision case and thus the zoning of the subject property was fully determined therein. Further, M-NCPPC was a party to those proceedings, was represented by counsel and, therefore, they and their privies are bound by that determination. It is submitted that the CSC zoning category of the subject property became the 'law of the case' in all other proceedings relating to the subject property. Additionally, there was the building permit case, i.e., the administrative appeal case[47], where the testimony[48] was under oath, transcribed and is the same as outlined above.

It is submitted that both the subdivision case and subsequent administrative appeal relating to the denial of the building permit are clearly *res judicata* as to both M–NCPPC and Prince George's County, *Burt v. Abel*, 466 F.Supp. 1234 at 1240-1241 (1979) as to *res judicata* and law of the case. Also see, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) supporting the position that collateral estoppel can be used where the party against whom it is sought has had a full hearing and lost.

The summary review of the facts and law of *res judicata* of this case by the 2nd CSA, footnote 1, App. 29a, of its unreported opinion seems to affirm, without reason, that

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[47] There are two cases to which *res judicata*, collateral estoppel and 'issue of the case' applies, (1) the subdivision case, Cir. Ct. for Prince George's County, Maryland, and resolved favorably to the petitioners in *Maenette B. Smith, et vir v. Maryland-National Capital Park & Planning Commission*, CAL 86-12679, and (2) the administrative appeal case, *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir*, 333 Md. 3, 633 A.2d 855 (1993), ultimately dismissed thereby leaving the Board of Appeals Order as a final adjudication.

[48] It is respectfully pointed out that all evidence and testimony referred to in this Petition is taken from the files of the Board of Appeals where the testimony was under oath and submitted as an affidavit in these proceedings by the Clerk of the Board of Appeals.

the Board of Appeals decision in *Prince George's County, et al. v. Maenette B. Smit h, et vir*, CAL 91-00205, (Board of Appeals Order at 128a), is neither, *res judicata*, the law of the case, or collateral estoppel with respect to the facts found by the Board of Appeals that M–NCPPC had changed the zoning map of the subject property and had improperly recommended denial of the building permit application. Clearly this is a misapplication of the law.

At all times material hereto, both M–NCPPC and Prince George's County have been in privity with one another, their positions in court have been the same. M–NCPPC and Prince George's County submitted the same brief and they have submitted the same pleadings in some instances, for example at App. 135a-139a, both in the administrative appeal case. In the administrative appeal case after M–NCPPC had been dismissed as a party, Prince George's County was the remaining party. Counsel for M–NCPPC, however, then entered his appearance for Prince George's County after his client, M–NCPPC, had been dismissed as a party. Accordingly, it is submitted that both M–NCPPC and Prince George's were in privity and that the administrative appeal case is *res judicata* to them, the facts being as determined by the Board of Appeals thus becoming final when that appeal was dismissed after being remanded from the Maryland Court of Appeals. Of course, the issues in the administrative appeal case were those decided by the Board of Appeals and their opinion is at App. 128a. At finding No. 12, App. 134a, the Board of Appeals found that **all** of the subject property was in the CSC zoning category when compared to the official zoning map, the only adopted and approved zoning map, the 1977 zoning map.

IV. Temporary Partial Taking – Unconstitutional

This Court has held that a regulatory taking of property that denies all beneficial use for a temporary time is a constitutionally compensable taking, *First English*

Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987). Likewise, this Court has held that conditioning the grant of a permit on grounds that do not relate to a valid public purpose is an unconstitutional taking and thus compensable, *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987). Cf. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See also, U.S. CONST. amend. V.

Thus, if the M–NCPPC did change the zoning map of the subject property without notice or hearing, the facts of the instant case bring it within the ambit of *Nollan* and *Dolan, supra*, a compensable taking. Of course, the nub of the problem is whether the M–NCPPC changed the zoning map of the subject property. Taking the language of the 2nd CSA on its face that there are no material facts in dispute, then conditioning the grant of the building permit on the application of a special exception or requiring a re-zoning of the subject property is, like the *Nollan* case, a compensable taking since the condition is for something that is not lawfully required because the property was zoned all in the CSC zone as ruled by the Board of Appeals, App. 128a[49], and particularly since the necessity of the conditions imposed were brought about by the original arbitrary and capricious act of M-NCPPC in changing the zoning map of the subject property without notice or hearing[50] as expressly required by statute.

It is submitted that where a governmental entity does what it has no lawful right to do, here change the zoning map of the subject property without notice or hearing, and then relies on the changed zoning map to recommend denial of a building permit, all as the undisputed evidence and facts show here, there is at least a temporary taking that is compensable. The case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) established the general principal that "...if

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[49] See also the numerous items listed above with respect to the argument with respect to *res judicata.*

[50] It is respectfully pointed out to the Court that the 2nd CSA stated that there was no dispute of any material fact.

regulation goes too far it will be recognized as a taking.". It is submitted that an uconstitutional taking does not require a permanent taking or a denial of all reasonable use of property and that it is sufficient that the government has arbitrarily and capriciously interfered with the owner's right to a particular use.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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